No. 11018

In the United States Circuit Court of Appeals for the Ninth Circuit

FERNAND CHEVILLARD AND GEORGE PATRON, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

BRIEF FOR APPELLEE

FRANK J. HENNESSY,
United States Attorney.
THERON LAMAR CAUDLE,
Assistant Attorney General.
JAMES W. KNAPP,
ROSCOE T. PILE,
Attorneys for Appellee.

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases—Continued. Page

Statutes:

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11018

FERNAND CHEVILLARD AND GEORGE PATRON, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

BRIEF FOR APPELLEE

JURISDICTIONAL STATEMENT

(a) The United States District Court for the Northern District of California had jurisdiction of the appellants and the subject matter as to Count II of the indictment under Section 80, United States Code, Title 18, defining the crime of presenting false claims and making false statements in matters within the jurisdiction of a department or agency of the United States; and had jurisdiction of the appellants and the subject matter as to Count III of the indictment under Section 88, United States Code, Title 18, defining the crime of conspiracy.

(b) The indictment alleges in Count II that at San Francisco, California, the appellants concealed and covered up by trick, scheme, and device a material fact within the jurisdiction of the War Shipping Administration and Count III charges the defendants con-

spired to commit offenses against the United States by violating Section 80, United States Code, Title 18.

(c) This court has jurisdiction of the appeal under the provisions of Section 225 (a) and (d), United States Code, Title 28.

STATEMENT OF CASE

Appellants were indicted on three counts, the first two charging violations of 18 U. S. C. Section 80 and the third charging conspiracy. They were acquitted of the offense alleged in the first count and convicted of the offenses charged in the second and third counts. This is an appeal from the judgment of the court sentencing each of them to be imprisoned for two years in a Federal Penitentiary on each count, the sentences to run consecutively (R. 33–37). The facts presenting the questions involved are more fully set out below in the summary of the evidence.

SUMMARY OF THE EVIDENCE

Appellants were the proprietors of a restaurant in San Francisco (R. 225, 234). They were indicted together with Julio Rodriguez, Pierre Barral, Clarence Jacky, Lucien DeAngury, and Angelo Vincenzini for violations of the false claims statute, 18 U. S. C. Section 80, and for conspiracy. The indictment contained three counts, the first count alleging that the defendants caused false statements and representations as to the amount of meat delivered to the War Shipping Administration to be made in a matter within the jurisdiction of the War Shipping Administration, the second count alleging that the defendants concealed and covered up by trick, scheme, and

device a material fact within the jurisdiction of the War Shipping Administration, the fact being that 17,832 lbs. of meat had been diverted from a shipment to the War Shipping Administration, and the third count alleged the existence of a conspiracy to commit offenses against the United States, the offenses being violations of 18 U. S. C. Section 80 (R. 2–8). Barral and DeAngury pleaded guilty (R. 31, 32). Vincenzini and Jacky were found not guilty on direction of the court. Rodriguez was found guilty on all three counts and appellants were acquitted as to count 1 and found guilty on counts 2 and 3 (R. 25–27). The indictment is printed in appellants' brief, pp. 4–9, and in the appendix to this brief.

Rodriguez and Barral were respectively chief steward and assistant steward on the *Sea Perch,* a troop transport being operated by the United Fruit Company, an agent for the War Shipping Administration (R. 85–87). The War Shipping Administration, through the United Fruit Company, ordered a considerable quantity of meat from the Ed Heuck Company for the *Sea Perch* in January 1945 (R. 86–87). The purchase order was captioned "W. S. 18,841 United States of America, War Shipping Administration, United Fruit Company, General Agent" (R. 86–87). All purchase orders are to the account of the United States of America, War Shipping Administration, and all the invoices presented to the United Fruit Company are rendered to the United States of America, War Shipping Administration, United Fruit Company, General Agents (R. 85–86).

The *Sea Perch* arrived in San Francisco harbor December 28, 1944. Rodriguez told Barral that they had about 20,000 lbs. of meat left aboard ship and they discussed the possibility of disposing of that meat (R. 126). Rodriguez went to New York shortly after their arrival and returned January 13, 1945. Barral visited the Normandy Restaurant January 13, 1945, and talked to the appellants, telling them he might get some meat for them. Appellant Chevillard expressed a willingness to take the meat any time they were ready (R. 126–127). Barral had a previous acquaintance with appellants (R. 123), particularly with the appellant Patron, having once gone to sea with him (R. 123, 225). On January 16, 1945, George M. Kinelle, a chef, was at the Normandy Restaurant and appellant Chevillard told him he had some people who had some meat. Kinelle stated that he could find somebody to buy meat (R. 152). On January 23 Kinelle left an order for 15,000 lbs. of meat at 75¢ per lb. (R. 153, 157).

On January 16, Rodriguez and Barral went to the Ed Heuck Co. and talked to Elroy Hinman, the manager of the company, in his office (R. 89, 91–92, 127–128). Rodriguez and Barral told Hinman they had 18,000 or 20,000 lbs. of meat on the *Sea Perch* and wanted to make an arrangement whereby that much of the shipment by the Ed Heuck Co. to the *Sea Perch* could be diverted and disposed of to their mutual profit (R. 91, 145). Rodriguez offered to see that the company received receipts for delivery of the entire order (R. 91, 145). Hinman stated that all their deliveries to the ships were for the account

of the War Shipping Administration and that he could not dispose of the meat anywhere else. Barral explained that he had means whereby he could dispose of the meat not delivered to the ship (R. 92.) Hinman met Barral on January 17 at a grill near the Heuck Co.'s place of business and was told the name of the ship, that it would be loaded the following week and was requested to supply a list of everything the Ed Heuck Co. was to load on the ship (R. 92). That evening Barral told appellants that they could get the meat. Appellants said they were ready to take the meat any time it would be fixed, and appellant Chevillard said the price would be 45 or 30 cents a lb. (R. 129). At that time Barral told appellants, "We had 30,000 lbs. of meat they had left on board the ship and that nobody knew about it and that we could get one truck load from the meat company and send that meat to them" (R. 140).

Thereafter Hinman and Barral met and went to the Palace Hotel, where Hinman showed Barral the meat order (R. 129–130). Hinman called the company and obtained the list of the cuts and Barral wrote them down. Barral and Hinman discussed the obtaining of a truck driver and Hinman finally said there was no one he could trust. Barral asked appellants to procure a truck driver but they never did (R. 130).

On the 18th or 19th of January Barral told appellants at the Normandy Restaurant how he was going to get the meat and about the delivery tags. He told them they would get the meat "not from the ship but from the meat company, that we have

the meat on the ship, 20 or 25,000 lbs. of meat and that we got a truck that would go to their place." He told the appellants that the meat was a truck load which would go to their place instead of going to the ship and that the meat would be covered by what was on board. Appellants asked him if it was safe and Barral replied, "The bill will be signed by the ship's steward or the checker" (R. 130–131).

On January 20, Barral and Hinman met and Hinman told him it would be better for Hinman to place the loaded truck on Sansome St. right adjacent to the plant and let it sit there until Barral's own driver came to pick it up (R. 95). On January 22 the same two met and Hinman told Barral the delivery receipts for the entire order would be placed on the seat of the truck (R. 95–96, 131). The shipment to the *Sea Perch* was loaded on trucks on January 23. One of the trucks was loaded and parked on Sansome St. and had about 17,500 lbs. on it (R. 104–105). Some of the meat on the truck was packed in boxes, sacks, and cartons which were later found by the FBI agents at the Millbrae Dairy (R. 105).

On January 23 Barral telephoned Hinman who told him the truck was sitting out on Sansome St. and the receipts were on the seat (R. 96). At about 11:30 a. m. on January 23 Rodriguez told Barral to go to the truck and get the bill to be signed and that he, Rodriguez, or the checker would sign the bill. Barral went to San Francisco, obtained the receipt and took it back to the ship where he gave it to the checker, Brandt-Neilsen, who signed the delivery tag (R. 108, 110–111, 112, 131–132, 136–137).

Barral took the delivery receipt for the entire meat order, including the meat on the truck parked on Sansome St., back to Hinman and gave it to him that afternoon (R. 96, 132, 148). At that time the truck load of meat for the *Sea Perch* was still standing on Sansome Street (R. 96). The receipt returned to Hinman by Barral was the delivery tag from which the Ed Heuck Co. prepared its billing against the War Shipping Administration for delivery to its agents the United Fruit Co. for collection of Heuck Co.'s charges (R. 96).

The checker, Brandt-Neilsen, was checking stores to be loaded on the *Sea Perch* on January 23 and during that day received some meat from the Ed Heuck Co. (R. 108). He received the delivery tags for the Heuck meat from Barral, signed the receipt of the Ed Heuck Co. for the entire meat order and gave three copies back to Barral to give to the drivers, keeping five copies for the office (R. 108, 111, 112). The checker did not actually check the meat received from the Ed Heuck Co. and for which he had signed the receipt (R. 108, 110, 111, 112). The checker gave the five copies of the receipts to Henry Hamburg (R. 108).

Hamburg was chief checker and received receipted delivery tags from Brandt-Neilson on January 23 (R. 114). Among those tags were the delivery tags for the meat received from Ed Heuck Co. (R. 114). He prepared the papers for signature and took them to the chief steward, Rodriguez, who signed them at his request (R. 114, 115–116). Following the sig-

681363—46——2

nature of himself and Rodigruez on the delivery tag Hamburg took the tag back to the accounting department of the United Fruit Co. (R. 114).

The shipping tag from the Ed Heuck Co. was received in the accounting department of the United Fruit Co. the next day (R. 117). The tag is used in support of an invoice and is used in the preparation of payment for the materials and supplies for which the tag calls (R. 117). The chief clerk in the accounting department held the tag until an invoice was received. He received from the Ed Heuck Co. an invoice calling for payment to them of 64,000 odd pounds of meat. The tag and accompanying invoice of the Ed Heuck Co. was sent to the New York office for payment. (R. 117–119). All bills for all supplies for the ships operated by the United Fruit Co. for the War Shipping Administration were paid by the New York office of the United Fruit Co. from a joint account which is established in accordance with the general agency agreement (R. 120).

After Barral gave the receipted delivery tag to Hinman, he went looking for a truck driver and found Lucien DeAngury (R. 132). Thereafter Barral went to the Normandy and told appellant Patron he had a truck driver. Patron took Barral and DeAngury to the latter's home, where he changed his clothes, and from there to the place where the truck was parked (R. 132, 141, 228). On January 22, appellant Chevillard had given Barral a map showing him how to get to Millbrae (R. 132, 142–149, 251), and on the 23rd he received a second map from Patron (R. 132–

133). DeAngury drove the truck and Barral sat beside him, Patron going ahead in his car (R. 133). On the way they had battery trouble with the truck, Patron coming back to help them (R. 133, 229). Patron went ahead and arrived at the Millbrae Dairy where he saw Jacky, whom he did not know, and told him he was from the Normandy Restaurant (R. 229). Appellant Chevillard was already at the dairy and both appellants went back along the road looking for the truck which they found having trouble with the lights (R. 230). Chevillard went back to the Dairy to tell Jacky the truck was on the way and Patron stayed to guide it in (R. 230). Chevillard had arranged for the storage of the meat at the Millbrae Dairy (R. 237–239, 240–241).

The truck arrived at the dairy and Barral, Jacky, DeAngury, and both appellants unloaded it (R. 133–134, 142, 231). Both appellants recognized the meat being unloaded from the truck as Government meat (R. 231, 232, 242, 243, 252). Both continued with the unloading after they recognized the meat as government meat (R. 231, 233, 242, 252) and Chevillard paid $30 storage charges to Jacky, taking back a receipt to Barral (R. 142–143, 149, 171, 243, 252).

Barral testified on behalf of the Government. He stated that he was one of the defendants named in the case, that he had pleaded guilty and that he was awaiting the judgment of the court following his plea of guilty (R. 123). It was stipulated that Barral was in jail at the time of giving his testimony (R. 143). He also testified that he did not expect to get off easy because of what he was saying in

court and that he was willing to pay for what he did (R. 143). On recross-examination by appellants' attorney, Barral testified that he pleaded guilty in this case, that he did not know there were three charges in the indictment and that all he knew was that he was in court (R. 151). Thereafter he was asked if he knew how long he could be sent to jail, to which government counsel objected and was sustained (R. 151).

Appellant Chevillard gave special agents for the FBI a signed statement which was introduced in evidence (R. 167–169). The statement was obtained under the following circumstances. Chevillard was taken into custody at about 1:10 a. m. January 24 at the Normandy Restaurant and was immediately removed to the San Francisco Field Office of the FBI (R. 172). He was informed that he was being placed under arrest in connection with a truckload of meat that was taken by Barral from the Heuck Meat Company and that the charge against him would be conspiracy to defraud the Government (R. 177). Special Agents Wilson and Fallaw told Chevillard they would like to ask him some questions about this matter and told him that he had a right to have a lawyer (R. 173). The statement signed by Chevillard was not in his words but was written by one of the agents after questioning the witness. The agents would question Chevillard and then write it up (R. 173, 175). They discussed with Chevillard what should go in and what should be left out (R. 179–180). Chevillard was offered something to eat during the questioning

but refused, saying he had just finished his dinner when he was arrested. However, he did drink some milk (R. 181). Chevillard read the statement before he signed it (R. 181). No threats or promises had been made to him (R. 174). The statement was signed about 5:30 a. m. January 24 (R. 181). A copy of the statement is included herein as Appendix C.

The statement contained admissions by Chevillard that he knew Barral was a chef on ships (R. 168), that two or three months previous Barral had tried to sell him some meat off his ship (R. 168), that on January 18 or 19, 1945, Barral told appellants he was going to have about 15,000 lbs. of meat to sell, and that the meat was to be bought for his ship, 30,000 lbs. in all, but he wouldn't need it all on the trip and wanted to sell 15,000 lbs. before it was put on ship (R. 169), that Barral told appellants that the meat belonged to the Merchant Marine (R. 170) and that after the truck was unloaded he paid Jacky $30 of his own money for storage (R. 171). It also contained other admissions, notably ones concerning making the arrangements for storage space, unloading the meat and the contacting of prospective purchasers (R. 169–172).

ARGUMENT

1. The District Court was correct in overruling the demurrers to the indictment

Appellants first contend that the second count of the indictment is fatally defective because certain words used in the statute were omitted. They argue that the second count charges the defendants con-

cealed and covered up a material fact within the jurisdiction of the War Shipping Administration whereas the statute proscribes the concealing and covering up of a material fact *in a matter* within the jurisdiction of a department or agency of the government. The omission of the words "in a matter" from the indictment, which followed the language of the statute, was undoubtedly an inadvertence, but such omission did not constitute a fatal defect. If the material fact covered up was within the jurisdiction of the War Shipping Administration it undoubtedly was in a matter within the jurisdiction of that agency. Furthermore, it is not necessary that an indictment follow the exact statutory language but only that the offense be substantially set forth and the essential elements charged. *Clemons* v. *United States,* 137 F. (2d) 302, 304 (C. C. A. 4); *Webster* v. *United States,* 59 F. (2d) 583, 586, (C. C. A. 8), certiorari denied 287 U. S. 629. The allegations in count two that the War Shipping Administration had ordered a certain quantity of meat from the Ed Heuck Co. and that the defendants sought to cover up the fact that they had diverted certain meat shipped pursuant to that order certainly alleges facts showing that the material fact covered up was in a matter within the jurisdiction of the War Shipping Administration.

Appellants' second contention is that no offense could be committed in the manner alleged in count two. Appellants argue the count is defective because it alleges the material fact was concealed by means of a receipt signed and issued by the War Shipping Administration itself and that there is no allegation con-

necting the defendants to the receipt. A careful reading of the second count reveals that the trick was the "signing and *causing* to be signed and issuing and *causing* to be issued" the receipt by the War Shipping Administration for the full amount of the meat ordered. How the defendants caused such a receipt to be signed and issued by the War Shipping Administration was a matter of evidence. The second count charges in effect that the defendants diverted certain meat from a shipment from the Ed Heuck Co. to the War Shipping Administration and converted the meat so diverted to their own use, and that this diversion was concealed and covered up by causing the War Shipping Administration to issue to the Ed Heuck Co. a receipt for the full amount of the shipment. This certainly alleges an offense under the statute. It is well settled that the true test of the sufficiency of an indictment is not whether it could have been made more definite and certain but whether it contains the elements of the offense and apprizes the defendant of what he must be prepared to meet. *Hopper* v. *United States,* 142 F. (2d) 181, 184–186 (C. C. A. 9); *Hagner* v. *United States,* 285 U. S. 427, 431; *United States* v. *Behrman,* 258 U. S. 280, 288. Here the indictment contains all the elements of the offense, it charging that meat destined to the War Shipping Administration had been diverted and that the diversion was covered up by causing the issuance of a receipt for the full amount of the meat by the War Shipping Administration to the meat company.

If the defendants believed they were entitled to be apprized of any additional facts in order to prepare

their defense they should have requested a bill of particulars. See *United States* v. *Polakoff,* 112 F. (2d) 888, 890 (C. C. A. 2) certiorari denied 311 U. S. 653, quoted with approval by this court in *Hopper* v. *United States,* 142 F. (2d) 181, 185.

Appellants strongly urge that count two of the indictment is further defective in that it fails to set out in haec verba the receipt referred to therein. The rule for which appellants contend is limited to indictments for forgery, counterfeiting or certain types of misuse of the mails, *Becher* v. *United States,* 5 F. (2d) 45, 49 (C. C. A. 2), certiorari denied 267 U. S. 602; *United States* v. *French,* 57 Fed. 382 (D. Mass.) The instrument need not be set out according to its tenor or according to its substance unless it touches the very pith of the crime itself as in forging or counterfeiting. *United States* v. *Heinze,* 161 Fed. 425, 427–428 (S. D. N. Y.), reversed on other grounds 218 U. S. 532; *United States* v. *Grunberg,* 131 Fed. 137 (D. Mass.). The receipt referred to in count two of the indictment is not, as in counterfeiting or forgery, the subject matter of the litigation and therefore need not have been set out in haec verba in the indictment. Cf. *United States* v. *Winslow,* 195 Fed. 578, 582, (D. Mass.), affirmed 227 U. S. 202.

Appellants argue that the third count of the indictment charging conspiracy to commit offenses against the United States by violating Title 18, U. S. C., Section 80 does not state an offense. Count three alleges that the defendants conspired to violate the provisions of Title 18, U. S. C., Section 80, in three

ways: (1) by agreeing to cause the Ed Heuck Co. to present a claim, false in part, to the War Shipping Administration for payment for more meat than was actually delivered; (2) by making and causing to be made false statements in a matter within the jurisdiction of the War Shipping Administration to the effect that the War Shipping Administration had received more meat than was actually received, and (3) by concealing and covering up by trick, scheme and device a material fact in a matter within the jurisdiction of the War Shipping Administration.

Appellants argue that as to (1) it was not alleged that the claim to be presented was for the payment of money and that to constitute a violation of Title 18, U. S. C., Section 80, there must be a claim for the payment of money or property. Even assuming *arguendo* that it is necessary, as appellants contend, that the claim must be for the payment of money or property, it is apparent from an examination of the third count that such an allegation is contained therein. Count three alleges in part:

> and agreed together to cause the said Ed Heuck Company to present a claim, false in part, to the said War Shipping Administration for payment from said War Shipping Administration for a total amount of approximately 64,793 pounds of meat. * * *

While there is no allegation as to amount or that the payment was to be made in money the foregoing certainly alleged that the claim was for *payment* for a certain amount of meat. Furthermore, the holding in *United States* v. *Cohn*, 270 U. S. 339, 345, cited

by appellants for the proposition that the statute relates only to the presentation of a claim for money, is no longer of any force. In *United States* v. *Gilliland,* 312 U. S. 86, 93, the Supreme Court directly held that the 1934 amendment to sec. 80 eliminated the necessity of showing pecuniary loss to the government.

Appellants contend that the third allegation of this count relating to the concealing of a material fact by causing a receipt to be issued by the War Shipping Administration is bad for the same reasons discussed with respect to the second count. Our arguments heretofore set forth in answer to their contentions as to the second count are equally applicable here.

While the allegations as to the offenses which the defendants conspired to commit may not have been stated as fully as in the substantive counts, it is well settled that in conspiracy indictments the offense which it is charged the defendants conspired to commit need not be stated with that particularity which would be required in an indictment charging the offense itself. *Craig* v. *United States,* 81 F. (2d) 816, 821 (C. C. A. 9), certiorari denied 298 U. S. 690.

2. The evidence was sufficient to establish appellants' participation in the offense charged in Count Two

The second count of the indictment alleges, in substance, that the War Shipping Administration had ordered a quantity of meat from the Ed Heuck Co., that certain meat was to be diverted from the shipment by the Heuck Co. to the War Shipping Ad-

ministration by the defendants and converted to their own use with intent to defraud the War Shipping Administration. Such diversion was to be concealed and covered up by the device of causing a receipt for the full amount of the meat shipment to be signed and issued by the War Shipping Administration to the Ed Heuck Company.

Appellants argue that the evidence shows them only to be receivers of the stolen meat and does not connect them with the issuance of the false receipt or show knowledge on their part that the meat belonged to other than the meat company. Such contentions ignore the true fact that this was an enterprise upon which appellants embarked knowing it to be illegal and after having been informed as to the general scope of the scheme.

Appellants were previously acquainted with Barral and knew he was a chef or steward on a ship (R. 123, 225,). Barral had talked to them about the meat nearly every night (R. 140). They knew the meat they were to get was intended for delivery to Barral's ship (R. 140), and that the diverted meat would be covered up by meat already on board and not reported by the stewards (R. 140). Chevillard admitted that he and Patron had been told by Barral that the meat belonged to the Merchant Marine (R. 170).

Moreover, appellants had been informed by Barral as to the manner in which the meat would be obtained. Barral testified that:

> I told Chevillard and Patron how I was going to get the meat, and about the delivery tags, in the Normandie Restaurant on the 18th

> or 19th of January. I told them that we would get the meat "not from the ship but from the meat company, that we had the meat on the ship, twenty or twenty-five thousand pounds of meat, and that we got a truck that would go to their place." I told them that the meat would be coming from the meat company. I said that the meat was a truckload, instead of going on board the ship it would go to their place, the meat was covered by what was on board, supposed to be left over. They asked me if it was safe. I says "The bill will be signed by the ship's steward or checker." They said to let them know when we would be ready to deliver the meat (R. 130–131).

What could be a plainer exposition of the fraudulent scheme? Appellants were told how the plan was to be worked. The meat was to be diverted from the delivery to the ship and the shortage covered by meat presently on board. The loss would be further concealed by procuring a fraudulent signing of the bill. Appellants were told about the delivery tags. Knowing these facts from the mouth of their partner, they assisted in carrying out the scheme. True, they had no hand in the procuring of the fraudulent delivery tag receipt. That was not their role. But they were eager participants in the entire enterprise and did their share. They located a storage place for the meat, assisted in removing the truck loaded with meat from Sansome Street to the Millbrae Dairy, helped unload it and Chevillard made a payment on the storage costs. This was a part of the offense charged in the second count since the diversion of

the meat was the central part of the enterprise and the fact which they were all interested in concealing.

Appellants certainly aided and assisted in the diversion of the meat and, having undertaken to promote the success of the enterprise, it was not necessary that they be present when the diversion of the meat was concealed and covered up through procuring the signing of the delivery tag receipts and transmitting them to the meat company, nor was it necessary that they be aware of the details of that part of the scheme. *Borgia* v. *United States,* 78 F. (2d) 550, 555 (C. C. A. 9), certiorari denied 296 U. S. 615; *Collins* v. *United States,* 20 F. (2d) 574 (C. C. A. 8). The act of appellants in assisting in the removal of the meat, unloading and storing it, as well as their attempt to find a purchaser, made possible the offense charged in count two and tended to cause its commission. Accordingly, they are liable as principals. *Collins* v. *United States,* 65 F. (2d) 545 (C. C. A. 5).

Appellants also contend that there has been no proof that they knew the meat belonged to the War Shipping Administration. Such protestations of lack of knowledge are not convincing. Their partners in the criminal enterprise, Rodriguez and Barral, by reason of their positions as stewards on the troop transport, and by reason of their handling of the delivery tags (govt.'s exhibits 5 and 9, R. 205–207), which on their face showed the meat to be consigned to the War Shipping Administration, knew that the meat was part of an order from the War Shipping Administration and would be paid for by that agency.

Certainly appellants should be chargeable with the knowledge of their partners.

In addition, appellants' knowledge that the meat which they assisted in removing was destined for Barral's ship, coupled with the knowledge that the government was waging bitterly contested wars across two oceans, create a logical inference that they were aware or at least had reason strongly to suspect that the government or one of its agencies was the purchaser of the meat and would ultimately pay for it. Compare *McGunnigal* v. *United States,* 151 F. (2d) 162 (C. C. A. 1), cert. den. No. 549, October Term, 1945, Supreme Court.

Finally, appellants admitted that upon unloading the meat at the Millbrae Dairy they saw that it was government meat (R. 231, 232, 242, 243, 252). Nevertheless, both continued as participants in the illegal transaction by continuing with the unloading and storing of the meat. In addition, Chevillard admittedly paid $30 storage charges. Both returned to the Normandy Restaurant without having withdrawn from the enterprise. Thus by their own admissions, appellants had knowledge of the character of the meat during their participation in the illegal enterprise and prior to their arrest.

Under such circumstances appellants were guilty participants in the offense charged in count two.

3. The evidence was sufficient to establish the existence of the conspiracy charged in Count Three and the appellants' participation therein

The third count alleged that the defendants conspired to commit offenses against the United States.

The offenses were alleged to be violations of Title 18, U. S. C. A., Section 80. The manner in which those offenses were to be committed was; (1) by causing the Ed Heuck Company to present a claim false in part, to the War Shipping Administration; (2) by causing false statements and representations to be made in a matter within the jurisdiction of the War Shipping Administration; and (3) by concealing and covering up, by means of a false receipt, the material fact that a portion of the meat order had been diverted, in a matter within the jurisdiction of the War Shipping Administration.

Appellants argue that none of the conspirators ever discussed the presenting of a false claim by the meat company to the War Shipping Administration. This completely misses the point that the indictment alleges the offense was to be committed by *causing* the presentation of a false claim. It has been previously demonstrated that Rodriguez and Barral, by reason of their employment as stewards, knew the meat to be supplied by Ed Heuck Co. was for the War Shipping Administration (*supra,* pp. 3–7). While there was no testimony of direct statements among the conspirators with reference to the presentation of a false claim by the meat company, such an understanding was implicit in their dealings. Rodriguez and Barral sought the cooperation of Hinman, the meat company manager, in diverting the meat ordered for the *Sea Perch.* In their initial conversation with Hinman, Rodriguez, and Barral stated that they had more beef on board than was reflected in their inventory and that up to 25,000 lbs. of beef could be

diverted to some other use. Rodriguez stated that he was willing to see that the meat company received receipts for the delivery of the entire order but that up to 25,000 lbs. should not be delivered to the ship and that the amount withheld be disposed of to the mutual profit of Hinman, Barral, and himself. Hinman advised him that all the deliveries of the meat company were for the account of the War Shipping Administration, United States Government, and that it would not be practicable to divert the meat. When Hinman said he had no way of disposing of the meat Barral explained that he had a means of disposing of it (R. 91–92).

It is apparent from the foregoing that from the very beginning the conspirators contemplated that the meat company would obtain payment for the entire order despite the fact that some meat had been diverted. The procurement of a receipt for the delivery of the *entire* order was stressed by the stewards and they proposed a division of the proceeds from the sale of the meat diverted. Certainly the latter presupposes that the company would obtain full payment from the War Shipping Administration. The conspirators must have understood that the procuring of a receipt for the complete meat order would result in the meat company rendering a bill or claim to the government agency for the sale price of the meat, otherwise they would not have suggested the division of the proceeds from the sale among themselves and Hinman.

Appellants, being businessmen and being aware that the plan involved procuring for the meat company

a receipt for the entire meat shipment, could not but have understood that the ultimate result would be an attempt by the meat company to collect the value of the meat shown on the receipt from the government. Accordingly, the appellants conspired to do an act which would naturally and probably result in a false claim being presented to the government and may be held responsible for the consequences. *United States* v. *Weisman,* 83 F. (2d) 470 (C. C. A. 2), certiorari denied 299 U. S. 560; *Corbett* v. *United States,* 89 F. (2d) 124 (C. C. A. 8); *Smith* v. *United States,* 61 F. (2d) 681 (C. C. A. 5), certiorari denied 288 U. S. 608.

Appellants contend there is nothing in the evidence to show that they knew that any statement or representation was to be made to the War Shipping Administration. The same arguments as are made above are equally applicable here. Knowing that a false receipt was to be procured appellants had reason to believe false statements would be made.

It should not be forgotten that by their own admission appellants became aware of the fact that they were dealing with government meat at the time they were unloading it. Hence, knowledge, by their own admission, came to them during the course of the conspiracy. They continued with the enterprise despite such knowledge. Hence they must have been aware, during the time they were engaged in their unlawful conduct, that the government would be billed for the meat and that the procurement of the false receipts for the meat company must necessarily result

681363—46——4

in a false statement in matters in which the government and one of its agencies was interested.

Lastly, appellants contend the evidence proves the existence of several conspiracies rather than a single conspiracy. Such is not the case; appellants were aware of the negotiations to persuade the meat company representative to divert the meat and accept the fraudulent receipt. They were in it from the start. Furthermore, there is no showing of substantial injury to the appellants even if the evidence does show several conspiracies. Under such circumstances the variance would not be fatal. *Berger* v. *United States*, 295 U. S. 78, 81; *McGunnigal* v. *United States*, 151 F. (2d) 162 (C. C. A. 1), certiorari denied No. 549, October Term, 1945, Supreme Court.

4. The Court did not err in refusing to direct the witness Hinman to produce the books of the Ed. Heuck Company, or in limiting the cross-examination of the witness Dean Heuck

Appellants contend that they should have been permitted, in their cross-examination of the government's witness Elroy Hinman, to require him to produce the books of the Ed Heuck Company for the purpose of refreshing the memory of the witness or testing his recollection. The only purpose the production of the books could have served would have been to determine whether the Ed Heuck Company had billed the government agency for the meat which had been diverted by the defendants. Hinman had not testified on direct examination with respect to the billing of the government for the meat in question but had merely stated that the receipted delivery tag returned to him by

Barral was "the delivery tag from which we prepare our billing against the War Shipping Administration for delivery to their agents, the United Fruit Company, for collection of our charges" (R. 96).

Appellants also contend that the government's witness Dean Heuck should have been permitted to answer their question as to who he billed for the 17,000 pounds of diverted meat and whether his company was ever paid for the meat. The witness had testified on direct examination that he supervised the filling of the meat order for *Sea Perch* and had loaded the truck parked on Sansome Street (R. 104–105). He did not testify as to the billing of the government for the meat.

Thus in both instances counsel for appellants was going beyond the scope of the direct examination in his questioning of the witnesses. Furthermore, at this time the government had introduced no testimony other than that quoted above with respect to the billing of the government for the meat. Counsel were anticipating the prosecution's presentation of evidence on this point. While it is settled that the right of cross-examination cannot be denied, it is equally well established that the scope of cross-examination is within the sound discretion of the trial court. *Madden* v. *United States,* 20 F. (2d) 289, 292 (C. C. A. 9), certiorari denied sub nom. *Parente* v. *United States,* 275 U. S. 554; and that is particularly true where the cross-examination is sought to be extended to matters not involved in the examination in chief. *Houghton* v. *Jones,* 68 U. S. 702; *Alpin* v. *United States,* 41 F. (2d) 495, 496 (C. C. A. 9).

Furthermore, there was no injury to the appellants since another government witness later testified that the United Fruit Company had received an invoice from the Ed Heuck Company, calling for payment to them for 66,000 odd pounds of meat and that the delivery tag and the invoice were sent to the New York office for payment out of a joint account established in accordance with the general agency agreement (R. 117–118, 120).

5. The Court did not err in limiting the cross-examination of the witness Barral

In the cross-examination of the witness Barral appellants' attorney asked the witness to what offense he had pleaded guilty. The government's objection was sustained. Thereafter on recross-examination by appellants' attorney, the witness testified that he didn't know how many charges he had pleaded guilty to and was asked whether he knew how long he could be sent to jail. The government's objection was sustained. Appellants now argue that the court's rulings prevented them from showing the witness was testifying under the promise or expectancy of receiving leniency.

Such a contention ignores the facts shown in the record. At the beginning of his testimony on behalf of the government this witness testified that he was one of the defendants in the case, that he had pleaded guilty and was awaiting the judgment of the court (R. 123). On cross-examination by an attorney for another defendant it was stipulated that the witness was presently in jail and the witness stated: "I don't

expect to get off easy because of what I am saying here in court. I am just willing to pay for what I did, that is all. I can't do nothing else" (R. 143). It is apparent that the jury knew the essential facts concerning the witness' predicament. It was aware that he had pleaded guilty and was awaiting sentence and it had heard the witness testify that he did not expect leniency in return for his testimony.

Under such circumstances appellants' contention that he was prevented, by the court's rulings, from showing that the witness was testifying for the government in the hope of obtaining a more favorable sentence by the court, rings hollow. Certainly no prejudice on that score could exist. The questions which appellants propounded to the witness could not in any way have tended to show a hope for leniency on the part of the witnesses. It was clear that he knew he was subject to a penalty of imprisonment and that the penalty had not yet been imposed. Whether he knew the technical description of the offense to which he pleaded guilty or the maximum sentence which could be imposed is immaterial in considering whether or not he had a hope of leniency. And, of course, unless the credibility of the witness was shaken because an expectation of leniency influenced his testimony, this question had no bearing on the case. Also the ruling of the court with respect to these particular questions did not constitute a ruling, as appellants would have us believe, that they could not show the witness was testifying in the hope of receiving a favorable sentence.

Thus the situation here is not, as in the cases cited by appellants, one in which the appellants were prevented from showing there was some expectation of immunity or favorable consideration on the part of the witness.[1] As pointed out above, the scope of cross-examination is a matter within the sound discretion of the court. *Blitz* v. *United States,* 153 U. S. 308, 312. This principle was repeated by the court again in the case of *Alford* v. *United States,* 282 U. S. 687, in which it said (p. 694):

> "The extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court."

Accordingly, the trial court was acting within its discretion in sustaining the objection to appellants' questions and there was no prejudice resulting to appellants from such rulings.

6. The Court was correct in admitting the signed statement of appellant Chevillard

Appellant Chevillard contends that the court erred in admitting his signed statement in evidence over his objection on the ground that at the time of the

---

[1] In *Alford* v. *United States*, 282 U. S. 687, the Supreme Court said (p. 694): "The trial court cut off in limine all inquiry on a subject with respect to which the defense was entitled to a reasonable cross-examination. This was an abuse of discretion and prejudicial error." In *Farkas* v. *United States*, 2 F. (2d) 644 (C. C. A. 6), the court not only sustained objections to testimony tending to show bias on the part of the witness because of a hope for clemency but also refused an instruction that the jury might consider the fact of delayed sentence as bearing on such hope and expressly instructed counsel not to argue the matter as affecting the motives of the witness.

introduction of the statement the corpus delicti had not been established. This objection was without merit. The statement was put in evidence at the end of the government's case. At the time the statement was offered Hinman had testified as to his dealings with Rodriguez and Barral, various employees of the meat company and the United Fruit Company had testified as to the delivery of the meat, signing of the receipts and the steps taken toward payment for the meat. Barral had told the story of his participation and of his dealings with the two appellants, and the FBI agents had testified to the recovery of the meat. Certainly this was ample independent evidence to establish the corpus delicti of the crime charged, and the objection of the appellant was properly overruled.

7. The Court was correct in refusing to strike the statement obtained from appellant Chevillard

Appellant Chevillard contends that the court was in error in refusing to grant his motion at the close of the government's case to strike the statement which he had given to the Special Agents of the FBI. In support of this contention Chevillard argues that the evidence shows his statement was not voluntarily given and that its admission constituted a violation of the rule announced by the Supreme Court in *McNabb* v. *United States,* 318 U. S. 332. Thus Chevillard seeks to avoid his statement both under the long-standing rule that a confession must be freely and voluntarily given in order to be admissible,

and under the recent rulings of the Supreme Court with respect to the admissibility of evidence.

Chevillard was arrested by the Special Agents of the FBI at the Normandy Restaurant in San Francisco at about 1:10 a. m. on January 24, 1945 (R. 172). At that time he was told that he was being placed under arrest in connection with a truckload of meat that was taken by Barral from the Heuck Meat Company, and that the charge against him would be conspiracy to defraud the government (R. 177). He was immediately taken to the FBI field office in San Francisco (R. 172) where he was told that he had the right to have a lawyer and was asked whether he was willing to make a free and voluntary statement (R. 173). The special agents questioned Chevillard and prepared the statement from his answers (R. 175), discussing with him what should go in and what should be left out of the statement (R. 179). During the time the statement was being prepared the special agents procured sandwiches and milk which were offered to Chevillard, who drank the milk but refused the sandwiches, saying that he had just finished dinner shortly before he was arrested (R. 181). Chevillard read the statement, said it was true, and signed it voluntarily and acknowledged that no threats or promises had been made against him or to him (R. 181, 174). The statement was signed at about 5 a. m. and he was promptly removed to the City Prison. There was no further conversation (R. 181). A copy of the statement is set forth herein Appendix C.

There is nothing in this set of facts to indicate that the statement of Chevillard was given involuntarily

or that it resulted from coercion by the special agents. Having been informed of the reason for his arrest and the nature of the charge against him, he certainly was not put in the position of answering the questions propounded to him blindly and without knowledge of the object and purpose of the questioners. Nor was he required to answer the questions without assistance of counsel, or indeed at all, unless he wanted to. He knew that he would be allowed to obtain a lawyer and he was asked if he wanted to make the statement. While the statement which Chevillard signed was not written or dictated by him, it was prepared during his conversation with the special agents. Every effort was made to insure the veracity of the statement, the agents including only information given by Chevillard which they were convinced was truthful, and assented to by Chevillard.

Nor was any statement of fact included unless it met with the assent of Chevillard, who was afforded a real opportunity to object to the wording of the instrument, as is attested to by the argument between him and the agents as to the use of the word "agreement." Finally Chevillard read the statement, said it was true, signed it and acknowledged that no threats or promises had been made against him or to him. Moreover, Chevillard was offered food and drink during the course of his conversation with the agents.

Although Chevillard's attorney did not renew his motion to strike the statement either at the conclusion of Chevillard's testimony in his own behalf, or before the submission of the case to the jury, his own

version does not alter the matter. By his own testimony Chevillard admitted knowing that he was entitled to the services of a lawyer and that the agents did nothing to prevent him from obtaining one (R. 244). He admitted that he was asked to give a statement and that he said he would give a statement (R. 244). While he testified as to some arguments occurring during his conversations with the agents there is nothing in his own testimony to indicate coercion (R. 245–247). The agents were seeking the truth and the appellant Chevillard tried to hide it or gloss it over. Under these circumstances it is only natural that there would be a considerable amount of quibbling over language during the course of the preparation of the statement.

Accordingly the trial court was correct in refusing to exclude the statement as evidence against Chevillard. It should be noted parenthetically that the statement was limited to Chevillard and was not admitted as evidence against appellant Patron or the other defendants in the case (R. 166).

The foregoing facts do not sustain appellant's contention that the statement should have been excluded because the appellant had not been taken before a U. S. Commissioner or other committing magistrate prior to the time it was obtained. Confessions are not excluded solely because the confessor was in custody of the police at the time they were obtained. The McNabb case[2] itself is careful to point this out; it being there stated (p. 346):

---

[2] 318 U. S. 332.

> The mere fact that a confession was made while in the custody of the police does not render it inadmissible.

Nor are confessions rendered inadmissible solely because at the time they were made the defendant had not been taken before a United States Commissioner or a committing magistrate. *United States* v. *Mitchell,* 322 U. S. 65. In that case the court stated the rule in the *McNabb* case as follows (p. 67):

> Inexcusable detention for the purpose of illegally extracting evidence from an accused, and the successful extraction of such inculpatory statements by continuous questioning for many hours under psychological pressure, were the decisive features in the *McNabb* case which led us to rule that a conviction on such evidence could not stand.

Here we have neither inexcusable detention, nor the purpose of illegally extracting evidence from an accused. And there is no evidence of any continuous questioning for many hours under psychological pressure. The appellant Chevillard was apprehended together with his partner, Patron, at their place of business several hours after they and their co-partners in the illegal enterprise had completed the removal and storage of the meat. Special Agents of the FBI had witnessed the removal of the truckload of meat to the Millbrae Dairy, and were aware of the general details of the plan. Having observed the execution of a crime which involved the diversion of 17,000 lbs. of meat belonging to the government, the agents were in duty bound to arrest known participants and recover the diverted meat. Chevillard was

accordingly taken into custody at 1:10 a. m., an hour at which it was impractical, if not impossible, to take him before a United States Commissioner or other commiting officer. There was, therefore, good reason for his detention during the early morning hours of January 24, 1945, without having been brought before a United States Commissioner or other committing officer.

Although the record is silent as to when appellant Chevillard was taken before a United States Commissioner or other committing officer,[3] an arraignment before the United States Commissioner shortly after the opening of his office for business on the morning of January 24, 1945, would comply with the statutory requirements and those of the Supreme Court. Neither the statutes pertaining to arraignment by arresting officers[4] nor the Supreme Court decisions set up a standard of conduct that is unreasonable or impractical. *United States* v. *Keegan,* 141 F. (2d) 248 (C. C. A. 2), reversed on other grounds, 325 U. S. 478, held that to expect an arraignment on the Fourth of July or the Sunday following would require a promptitude not contemplated by the statutes and upheld the admission of statements obtained from two of the defendants during those holidays and before arraignment. To exclude the statement of Chevillard

---

[3] Appellant Chevillard did not see fit to include in the record evidence of the time when he was actually taken before a United States Commissioner in San Francisco, doubtless because this occurred on January 24, 1945, the day he was arrested.

[4] U. S. C., Title 5, Section 300a; U. S. C., Title 18, Section 595.

solely because he was not taken before the committing officer during the early hours of the morning would, it is submitted, afford the statutes and the rule laid down by the Supreme Court, too drastic an interpretation.[5]

The Special Agents of the FBI, being good police officers, were endeavoring to ascertain the identity of all those who had participated in the diversion. It was their duty to do so. They were well aware of Chevillard's participation but they apparently had no information concerning the identity or role played by those in charge of or employed at the Millbrae Dairy. Under such circumstances an immediate questioning of all those arrested was necessary in order to ascertain if possible the identity of other culprits, for to delay the attempt to secure such information would enable the guilty parties to escape or to cover their part in the enterprise. The prompt interrogation of Chevillard in particular was further dictated by finding the receipt for the meat from the Chip Steak Co. to Pierre Barral in Chevillard's billfold and the slip of paper with the name, address, and telephone number of A. Vincenzini, who ultimately became a co-defendant, in Chevillard's topcoat pocket (R. 167–168). Both furnished important clues to

---

[5] Compare *United States* v. *Mitchell*, 322 U. S. 65, wherein the confession, obtained shortly after defendant's apprehension, was held admissible even though the defendant was not arraigned until eight days later. It is thus apparent that mere illegal holding of the prisoner without arraignment will not void a confession voluntarily given immediately upon arrest.

other possible participants and the immediate questioning of Chevillard was necessary for the purpose of ascertaining their identity. Chevillard expressly consented to the interrogation, presumably with some hope that in this manner he could convince the agents he was innocent of any wrongdoing or explain away his conduct. Voluntary submission to questioning by those arrested is not without its advantages to the accused, especially where he is innocent of any wrongdoing.

Finally, the element of "continuous questioning for many hours under psychological pressure" referred to in the *Mitchell* case, and present in the other cases cited by appellants in their brief, is not present here. The total time elapsing between the beginning of the interrogation and the signing of the statement was not more than 3½ hours (R. 172, 173). During this time Chevillard was afforded an opportunity to partake of refreshments in the form of sandwiches and milk and he drank the milk (R. 181). This itself indicates the questioning was neither grueling nor intensive.

The actual writing of the statement began one hour after the beginning of the interrogation, that first hour being given over to denials on the part of Chevillard (R. 172, 174). The agents started to reduce the statement to writing when they believed Chevillard was telling the truth and it took approximately 2½ hours from that time to question appellant, get the facts straight and write out the statement in longhand. Once the statement was signed, there was no further interrogation. Accordingly, this is not a situation

where the confessor was worn down physically and mentally by long hours of continuous questioning without rest or refreshment.

In this respect the case at bar differs from *Gros* v. *United States,* 136 F. (2d) 878 (C. C. A. 9), wherein the appellant had been questioned many hours daily for five days, and *Runnels* v. *United States,* 138 F. (2d) 346 (C. C. A. 9), where appellant had been held in solitary confinement and questioned for 17 days, both of which were decided by this court and cited by appellants in their brief. *Ashcraft* v *Tennessee,* 322 U. S. 143, deals with similar protracted interrogation by state officers and is confined to narrow limits.

Finally, it is submitted that even if the admission of Chevillard's statement be regarded as erroneous it did not constitute such prejudicial error as to require the reversal of this case. The statement added nothing to the evidence previously adduced. In fact, in testifying on his own behalf appellant Chevillard admitted nearly all of the information contained in the statement to be true. It was only with respect to a relatively few facts that Chevillard denied the truth of facts incorporated in the statement. Under such circumstances, the admission of the statement could hardly have been prejudicial to Chevillard. This court has previously refused to reverse where the evidence, without consideration of the confession, is sufficient to sustain a conviction. *Paddy* v. *United States,* 143 F. (2d) 847, 852 (C. C. A. 9), certiorari denied 324 U. S. 855.

8. The Court correctly instructed the jury as to the criminal intent necessary to convict appellants

Appellants urge that the instruction by the District Court is erroneous on the ground that it "did not contain the element that the person accused of aiding and abetting another in the commission of a crime, must have a criminal intent and that such act of aiding and abetting must be done with the intent of having the ultimate act actually done and accomplished" (Pet. Br. p. 108). Assuming appellants' contention that one accused of aiding and abetting another in the commission of a crime must have an intent to aid and abet the ultimate criminal act to be correct, their objection has no merit for the reason that the trial court in its instruction said "A person who *knowingly* renders assistance, cooperation, and encouragement in the commission of an offense is one who aids and abets in the commission" (R. 264).

One who "knowingly" commits an offense forbidden by law certainly also "criminally intends" to do the act. It is difficult to understand how the appellants could knowingly assist in the diversion of 17,000 pounds of meat destined for troopships belonging to the government of the United States without having criminally intended to defraud the United States. The decision in *United States* v. *J. Greenbaum & Sons,* 123 F. (2d) 770, 773 (C. C. A. 2), is opposed to the appellants' contention. In that case, where the defendants were charged with presenting false pay-roll reports to an agency of the United States in violation of 18 U. S. C., Sec. 80, the District Court had gone so far as to charge the jury that

"intent" is not an element of the crime charged, yet the Circuit Court of Appeals for the Second Circuit held the error to be harmless and sustained the charge because it had emphasized that the jury must find defendant "knew the falsity of the pay-rolls in order to find him guilty".

The instruction in the instant case is much more favorable to the defendants than was the instruction in the *Greenbaum* case. The court here has required that defendants must *knowingly* render assistance. The court did not say here that intent is not an element of the crime, but on the contrary devoted a full paragraph of its instructions to the "intent" that must exist in every crime (R. 262).[6]

Thus appellants pick out a part of the general charge to the jury and object to it as not specifically containing a statement on the element of criminal intent, and yet preceding by only three paragraphs the objected part of the instructions is this quoted statement that there "must exist" a "joint operation of act and intent" in "every crime." Following this is a statement of what may constitute intent. Not only in this paragraph, but through the whole instructions to the jury runs the general tenor of the

---

[6] The court charged: "In every crime there must exist a union or joint operation of act and intent, and for a conviction both elements must be proven to a moral certainty. Such intent is merely the purpose or willingness to commit such act. It does not require a knowledge that such act is a violation of law. However, a person must be presumed to intend to do that which he voluntarily and wilfully does in fact do, and must also be presumed to intend all the natural, probable, and usual consequences of his own act."

requirements—knowingly, wilfully and intentionally. Hence appellants are in the position of objecting merely because the instruction as to intent was not given in the particular language selected by themselves, plainly an untenable position. *Coffin* v. *United States,* 162 U. S. 664, 672.

9. There was no error in the failure to give specific instructions as to the possible bias of Barral and DeAngury, who had pleaded guilty

Appellants contend the court erred in refusing to give their requested instruction number three dealing with the credibility which might be accorded the testimony of Barral and DeAngury who had pleaded guilty and became government witnesses. They argue that the jurors should have been instructed that in determining the credibility of these witnesses they might take into consideration the fact that the witnesses had pleaded guilty and were awaiting sentence, and also any bias or hope of leniency which they might find to exist on the part of the witnesses because of their predicament.

Appellants wholly ignore the court's charge. At the very outset the court instructed the jury that "The fact that two defendants pleaded guilty creates no presumption of any kind as to the guilt or innocence of the three defendants now on trial" (R. 256). The court gave the usual instruction relative to the right of the jury to pass on the credibility of various witnesses (R. 259–260) and admonished the jury to consider the following elements: "The circumstances under which the witness testifies; his demeanor and manner on the witness stand; his intelligence; *the*

connection or relationship which he bears to the government or to the defendants; the *manner in which he might be affected by the verdict;* the extent to which he is contradicted or corroborated by other evidence, if at all; and any other matter which reasonably sheds light upon the credibility of the witness." [Italics supplied.]

Finally, the court specifically charged with respect to the credibility of accomplice testimony. It said:

> An accomplice is defined to be one concerned with others in the commission of a crime. It is a settled rule of law in this country that even accomplices in the commission of a crime are competent witnesses, and that the government has the right to use them as such; it is the duty of the court to admit their testimony and that of the jury to consider it. *The testimony of accomplices, however, is always to be received with caution and weighed and scrutinized with great care, and the jury should not rely upon it unsupported, unless it produces in their minds a most positive conviction of its truth.* If it does, the jury should act upon it (R. 263). [Italics supplied.]

It has been repeatedly held that instructions similar to the foregoing amply protect the rights of the defendants and more particular comments by the court have not been required. *Cossack* v. *United States*, 82 F. (2d) 214 (C. C. A. 9) certorari denied 298 U. S. 654; *Outlaw* v. *United States*, 81 F. (2d) 805 (C. C. A. 5) certiorari denied 298 U. S. 665; Cf. *Caminetti* v. *United States*, 242 U. S. 470, 495.

The refusal to give the instruction requested by appellants must be regarded in the light of the charge

actually given. *Pine* v. *United States*, 135 F. (2d) 353 (C. C. A. 5) certiorari denied 320 U. S. 740. It is apparent from the foregoing excerpts of the charge that the jury was fully instructed as to the care with which it should receive and weigh the testimony of the accomplices. Under these circumstances, it is difficult to perceive how the appellants were prejudiced in any way by the failure to name the witnesses who were accomplices and point out their possible bias against appellants and hope of leniency or immunity.

10. The Court was correct in its instruction with respect to circumstantial evidence

Appellants contend that the court erred in refusing to give their requested instruction No. 37, to the effect that when independent facts and circumstances are relied upon to establish by circumstantial evidence the guilt of the defendant, each material, independent fact or circumstance in the chain of facts relied upon must be established to a moral certainty and beyond a reasonable doubt, and that if any fail to be so established a verdict of not guilty must be returned (R. 289). This contention can be answered easily by a reference to the decision by this court in *Shepard* v. *United States,* 236 F. 73, 79 (C. C. A. 9), where the lower court had instructed the jury that:

> Where the evidence is entirely circumstantial, yet is not only consistent with the guilt of the defendant, but inconsistent with any other rational conclusion, the law makes it the duty of the jury to convict.

This instruction is similar to the one given by the trial court in the case at bar and was objected to by de-

fendants in the *Shepard* case for much the same reason, namely:

> It is objected to this instruction that it failed to state that each circumstance essential to the conclusion of guilt must be proved to the same extent as if the whole issue rested upon the proof of such essential circumstance, and that the hypothesis of guilt should flow naturally from all the circumstances and be consistent with them all.

This Court upheld the lower court by saying (pp. 79–80):

> The instructions of the court with respect to a reasonable doubt covered this objection, and, in particular, where the court instructed the jury that: "You cannot find the defendant guilty unless from all the evidence you believe him guilty beyond a reasonable doubt."

In the instant case the court charged in substance that if upon a consideration of the whole case they were satisfied to a moral certainty and beyond a reasonable doubt of the guilt of any of the defendants, they should so find, irrespective of whether the evidence was circumstantial or direct. The court also charged that in cases of circumstantial evidence facts should be proven which are not only consistent with the guilt of the defendant, but inconsistent with any other reasonable hypothesis (R. 262, 272). This particular instruction was reiterated (R. 283) by the court after the appellants' attorney had voiced his opinion that the court had not included such a statement in the instruction (R. 276).

It is obvious from a comparison of the *Shepard* case and this case that the lower court here was as solicitous of defendants' interests in its instructions to the jury, as was the court in the *Shepard* case. The lower court here required that the jury apply the same test in weighing circumstantial evidence, i. e., it must convince them to a moral certainty and beyond a reasonable doubt—as in weighing direct evidence; and in addition instructed the jury that facts proved by circumstantial evidence must be not only consistent with the guilt of the defendant, but inconsistent with any other reasonable hypothesis.

11. The refusal to give appellants' requested instruction Number Eleven did not constitute error

Appellants contend that the refusal of the trial court to give their requested instruction with respect to the second count of the indictment constitutes reversible error. By that request appellants sought to have the jury instructed to return a verdict of acquittal unless it found that the appellants in fact signed the War Shipping Administration receipt for the meat or caused it to be signed or were instrumental in having it signed. Appellants argue that the theory of their defense was that they had no part in the signing of the receipt and did not even know it was issued and that they were entitled to an explicit instruction on their theory.

Appellants' theory and their requested instruction go too far. It was not necessary for the prosecution to show that appellants had a part in the actual signing of the receipt. All that was required for the jury to find the defendants guilty was that they knew or

could be reasonably expected to know that their acts would naturally and probably result in concealing and covering up a material fact in a matter within the jurisdiction of a government department or agency by means of a trick or scheme. Thus it was not necessary to prove appellants took any part in the signing of the receipts. Compare *McGunnigal* v. *United States,* 151 F. (2d) 162 (C. C. A. 1), certiorari denied No. 549, October Term, 1945, Supreme Court.

The court in fact charged that the jury must be convinced beyond a reasonable doubt and to a moral certainty that the defendants or any of them performed the acts set out in the indictment, which acts had been previously described (R. 265–266). This, coupled with the other portions of the charge as to circumstantial evidence, intent and the like, sufficiently informed the jury of what it must find in order to convict appellants. It has been previously pointed out that there is ample evidence sustaining a verdict of guilty.

CONCLUSION

For the reasons heretofore set forth it is respectfully submitted that the judgment of the District Court should be affirmed.

FRANK J. HENNESSY,
United States Attorney.
THERON LAMAR CAUDLE,
Assistant Attorney General.
JAMES W. KNAPP,
ROSCOE T. PILE,
Attorneys.

FEBRUARY 1946.

APPENDICES TO BRIEF FOR THE UNITED STATES

Appendix A

STATUTES INVOLVED

18 U. S. C., Sec. 80 reads:

> Whoever shall make or cause to be made or present or cause to be presented for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

18 U. S. C., Sec. 88 reads:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy * * * not more than $10,000, or imprisoned not more than two years, or both.

Appendix B

THE INDICTMENT

Counts Two and Three of the indictment, under which counts the appellants were convicted and sentenced, read (R. 2–8):

SECOND COUNT

(Title 18 U. S. C. A. Section 80)

And the said Grand Jurors upon their oaths do further present that the said defendants Julio Rodriguez, Pierre Francois Barral, Fernand Chevillard, George Patron, Clarence Valentine Jacky, Lucien L. De Angury, and Angelo Italo Vincenzini, on the 23rd day of January, 1945, in the City of Oakland, County of Alameda, State of California, within the Southern Division of the Northern District of California and within the jurisdiction of this Court, did knowingly, wilfully, unlawfully, and feloniously cover up and conceal by a trick, scheme, and device a material fact within the jurisdiction of the War Shipping Administration, a department and agency of the United States of America, the material facts so covered up and concealed by a trick, scheme and device being as follows:

That the said defendants, well knowing at all times herein mentioned that the said War Shipping Administration had ordered from the Ed Heuck Company of San Francisco (a limited [2] partnership consisting of Edward L. Heuck, general partner; Dean Heuck, limited partner; and A. Pasquini, limited partner; and A. Pasquini, limited partner; hereafter re-

ferred to as the Ed Heuck Company) approximately 64,793 pounds of meat, to be delivered by the said Ed. Heuck Company to the said War Shipping Administration, diverted and withheld from said shipment approximately 17,832 pounds of said meat with the intent and for the purpose of converting the same to their own use, and with intent to defraud the said War Shipping Administration covered up and concealed said material fact of said diversion and conversion by the said defendants of said approximate amount of 17,832 pounds of meat by the trick, scheme, and device of signing and causing to be signed, and issuing and causing to be issued by the said War Shipping Administration, a receipt to the said Ed Heuck Company for approximately 64,793 pounds of meat.

THIRD COUNT

(Title 18 U. S. C. A. Section 88)

And the said Grand Jurors upon their oaths do further present that the said defendants Julio Rodriguez, Pierre Francois Barral, Fernand Chevillard, George Patron, Clarence Valentine Jacky, Lucien L. De Angury, and Angelo Italo Vincenzini, on or about the 16th day of January, 1945, in the City and County of San Francisco, State of California, within the Southern Division of the Northern District of California and within the jurisdiction of this Court, did, in violation of Title 18 U. S. C. A. Section 88, unlawfully, wilfully, knowingly, and feloniously conspire, combine, confederate, and agree together, and with divers persons whose names are to the Grand Jurors unknown, to commit offenses against the United States to wit, to defraud the United States in violation of Title 18 U. S. C. A. Section 80 in the manner following, to wit: [3]

That the said defendants at all times herein mentioned, knowing that the War Shipping

Administration, a department and agency of the United States, had placed a purchase order with the Ed Heuck Company of San Francisco, California (a limited partnership consisting of Edward L. Heuck, general partner; Dean Heuck, limited partner; and A. Pasquini, limited partner; hereinafter referred to as the Ed Heuck Company) for approximately 64,793 pounds of meat for delivery to the said War Shipping Administration and for its use, conspired, confederated, and agreed together to cause the said Ed Heuck Company to present a claim, false in part, to the said War Shipping Administration for a total amount of approximately 64,793 pounds of meat, when in truth and in fact, as the said defendants and each of them then and there well knew, approximately only 46,961 pounds of meat would actually be delivered to the said War Shipping Administration by the said Ed Heuck Company; and by the said defendants making and causing to be made false statements and representations in a matter within the jurisdiction of the said War Shipping Administration, to wit, that approximately 64,793 pounds of meat had been received by the said War Shipping Administration from the said Ed Heuck Company, when in truth and in fact, as the said defendants and each of them then and there well knew, approximately only 46,961 pounds of meat had actually been delivered to and received by the said War Shipping Administration; and by the said defendants covering up and concealing by trick, scheme, and devise a material fact relating to a matter within the jurisdiction of said War Shipping Administration, to wit; said material fact being that the said defendants had diverted to their own use and personal gain approximately 17,832 pounds of meat from a [4] shipment consisting of approximately 64,793 pounds of meat purchased by and intended for the use of said

War Shipping Administration from the said Ed Heuck Company, and covered up and concealed said material fact by the trick, scheme, and device of signing and causing to be signed, and issuing and causing to be issued by the said War Shipping Administration, a receipt to the said Ed Heuck Company for approximately 64,793 pounds of meat.

That during the existence of said conspiracy and in furtherance of the same, and to effect the objects thereof, in said Division and District and within the jurisdiction of this Court, one or more of said defendants, as hereinafter mentioned by name, did the following overt acts, to wit:

1. That on or about the 16th day of January, 1945, in the City and County of San Francisco, State of California, the said defendants Julio Rodriguez and Pierre Francois Barral met and held a conversation with one Elroy Hinman;

2. That on or about the 18th day of January, 1945, in the City and County of San Francisco, State of California, the said defendants Pierre Francois Barral, George Patron, Fernand Chevillard, and Lucien L. De Angury met and held a conversation;

3. That on or about the 22nd day of January, 1945, the said defendant Fernand Chevillard telephoned from the City and County of San Francisco, State of California, to the said defendant Angelo Italo Vincenzini at the City of South San Francisco, State of California;

4. That on or about the 23rd day of January, 1945, in the City and County of San Francisco, State of California, the said defendants Lucien L. De Angury and Pierre Francois Barral drove a truck loaded with approximately 17,832 pounds of meat from the City and County of San Francisco, State of [5] California, to the City of Millbrae, County of San Mateo, State of California;

5. That on or about the 23rd day of January, 1945, in the City of Oakland, County of Alameda, State of California, the said defendant Julio Rodriguez signed a receipt from the Ed Heuck Company for 64,793 pounds of meat;

6. That on or about the 23rd day of January, 1945, in the City of Millbrae, County of San Mateo, State of California, the said defendants Pierre Francois Barral, Fernand Chevillard, George Patron, Clarence Valentine Jacky, and Lucien L. De Angury unloaded from a truck approximately 17,832 pounds of meat and placed the same in cold storage on the premises of the defendant Clarence Valentine Jacky.

FRANK J. HENNESSY,
United States Attorney.

TOM C. CLARK,
Assistant Attorney General.

[Endorsed]: A true bill, D. Bosschart, Foreman.

Presented in open court and ordered filed Jan. 31, 1945.

C. W. CALBREATH,
Clerk. [6]

Appendix C

The statement given by appellant Chevillard to agents of the Federal Bureau of Investigation reads (R. 168–172):

January 24, 1945,
San Francisco, California.

I, Fernand Chevillard, hereby make the following voluntary statement to Special Agents Ronald A. Wilson and Lee M. Fallaw of the Federal Bureau of Investigation, first having been told by them that I have the right to have an attorney, that I do not have to make any statement and that any statement I do make may be used against me in court. No threats or promises have been made to me and no inducements have been offered me. I have known Pierre Barral for about six months. He would come to the Normandie Restaurant to see me and my partner, George Patron. I knew that Pierre Barral was a chef on ships. About two or three months ago Barral offered to sell me some meat off his ship, but I did not buy any. For the past ten days Barral has been coming to the Normandie Restaurant from his ship. About Thursday or Friday, [141] Jan. 18 or 19, 1945, Barral came to the Normandie Restaurant and told Patron and me that he was going to have about 15,000 pounds of meat to sell, that this meat was to be bought for the ship, 30,000 lbs. in all, but he wouldn't need it all on the trip and wanted to sell 15,000 lbs. of it before it was put on the ship. Barral offered to sell me 15,000 lbs. of New York Cuts, Filets, rib and lamb at 40¢ per pound. He said he wanted to sell the whole 15,000 lbs. at the same time. I told him I was broke and

couldn't buy the meat, but that I would inquire around to see if I could find anyone to buy the meat and I told Barral I would also try to find a place for the meat to be stored. Every day after that Barral asked me if I had found anyone to buy the meat or if I had found a place to store it. Barral told me he would have the meat in a truck and we had nothing to worry about except to find a place to store the meat. George Patron was present when Barral made this statement. This agreement to try to sell the meat and find a storage place for it was between Pierre Barral, George Patron and myself. We did not have an understanding about what payment was to be made to Patron and myself for finding a purchaser for this meat or for finding a storage place for it, but I expected to receive some payment from the purchaser of the meat or to profit in some way from this transaction. After having discussed the matter with Barral I made inquiries of several persons as to whether they would be interested in purchasing this meat. I also made inquiries regarding refrigerator space to store the meat. Angelo Vincenzini, a butcher who lives at 540 San Antonio Ave., Lomita Park, Calif., told me he thought I could get storage space for the meat at Millbrae Dairy and then advised me there was [142] storage space there which I could get. That night at the Normandie Restaurant I told Barral and Patron there was storage space available. Barral said the truck driver didn't want to come and I said "the deal's off" because I realized the deal was wrong. Barral had told Patron and me that the meat belonged to the Merchant Marine. On Jan. 23, I was at 35 Lake St., when I got a phone call about 4:30 p. m. from Mrs. Patron, who said George Patron had told her to get in touch with me by any means possible and tell me to go to Millbrae. I then drove to Millbrae in my car

and saw Mr. Jacky of the Chip Steak Co., who has the Millbrae Dairy. I told Mr. Jacky I had come for the storage space that Angelo Vincenzini had talked to him about. I then waited for the truck with the meat to arrive. I knew that George Patron would accompany the truck. Between 8:30 and 9:00 P. M., Patron came in his car to the refrigeration plant. Barral was in the truck with its driver, Lucian, whom I know by sight, when it drove up at the same time. Mr. Jacky was the only other person present. Patron, Barral and the truck driver unloaded the meat from the truck while I checked the weights of the meat with Mr. Jacky. I kept a record of the weights in my address book, notations indicating the total weight of the meat was 15,875 lbs. After the truck was unloaded Mr. Jacky asked me in whose name the receipt should be made and I told him Mr. Barral. The copy of the receipt was given to me instead of to Mr. Barral as Mr. Barral was absent changing his clothes at the time. However, the receipt would probably have been given me anyway, so I could get the meat for a purchaser if I had decided to go through with the deal, as Mr. Barral was leaving town in a short time. I paid Mr. Jacky $30 [143] of my own money on account for storage, which was to be at one cent a pound per month, and we agreed to settle the balance the next day. I made these arrangements with Mr. Jacky. The receipt was turned over by me to Special Agents Wilson and Fallaw on Jan. 24, 1945. I also turned over to them my notebook showing notations I made checking the meat off the truck. After the truck was unloaded I told the others that I would see them later and drove back to San Francisco alone in my car. I have not discussed the meat with anyone since that time. I got back to the Normandie Restaurant about 11:00 P. M. The hostess, Mrs. Sarah Hughes, gave me a slip of paper

on which was written "Order for 15,000—about 75" and which bore the signature of George, the chef at the Troc, a night club on Geary Blvd. I had discussed the meat with George and told him I knew where he could get meat, and I took this note to mean he would buy 15,000 lbs. of meat at 75¢ a lb. The price indicates to me that he wanted filets or New York cuts. I had also talked to Angelo Vincenzini and told him he could probably get some of this meat at 40¢ or 50¢ per pound. He said he might be interested in buying some of the meat later. I told Angelo Vincenzini all about the meat and where it was coming from and how it was being obtained, and he said he wanted to stay out of jail. This was on Monday, Jan. 22, 1945. During the past five or six days I mentioned this meat to several other chefs, whose names I do not know, thinking they might want to buy some of the meat.

I have read this statement on five pages and it is true.

FERNAND CHEVILLARD.

Ronald A. Wilson, Special Agent, FBI—1/24/45.

Lee M. Fallaw, Special Agent, FBI, San Francisco, California. [144]

U. S. GOVERNMENT PRINTING OFFICE: 1946